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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

ISAI BALTEZAR & JULIE CHO,

*Plaintiffs,*

vs.

MIGUEL CARDONA, *in his official capacity  
as Secretary of Education*, & UNITED  
STATES DEPARTMENT OF EDUCATION,

*Defendants.*

Case No. 20-cv-00455-EJD

**PLAINTIFFS' RESPONSE TO  
DEFENDANTS' STATEMENT OF  
SUPPLEMENTAL AUTHORITY AND  
COUNTER-STATEMENT  
OF SUPPLEMENTAL AUTHORITY**

Date: March 24, 2022  
Time: 9:00 am  
Place: Courtroom 4, 5th Floor  
Judge: Hon. Edward J. Davila

**PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF SUPPLEMENTAL  
AUTHORITY AND COUNTER-STATEMENT OF SUPPLEMENTAL AUTHORITY**

Plaintiffs make this brief submission in response to Defendants' Statement of Recent Decision regarding *Center for Environmental Health v. Vilsack*, No. 18-cv-01763-RS, 2022 WL 658965 (N.D. Cal. March 4, 2022), *see* Dkt. 64, and to file their own Notice of Supplemental Authority.

1        First, *Center for Environmental Health* is factually and materially distinguishable. There,  
 2 the Court declined to vacate the U.S. Department of Agriculture’s OLPP Rule, because “vacatur  
 3 would trade one defective rule for another.” *Id.* at \*5. Here, vacating the Repeal of the Gainful  
 4 Employment Rule would “trade” the unlawful Repeal for a reinstatement of the 2014 Gainful  
 5 Employment Rule, which has already been upheld by numerous courts. *See Ass’n of Proprietary*  
 6 *Colls. v. Duncan*, 107 F. Supp. 3d 332 (S.D.N.Y. 2015); *Ass’n of Private Sector Colls. & Univs.*  
 7 *v. Duncan*, 110 F. Supp. 3d 176, 190–91 (D.D.C. 2015), 640 Fed. App’x 5 (D.C. Cir. 2016); *cf.*  
 8 *Am. Ass’n of Cosmetology Schs. v. DeVos*, 258 F. Supp. 3d 50, 56, 76 (D.D.C. 2017) (crafting  
 9 limited relief in a narrow, as-applied challenge to an aspect of the Gainful Employment rule, but  
 10 twice noting that the relief granted would “avoid[] upending the entire” 2014 Gainful  
 11 Employment Rule).

12        Second, Defendants assert that in *Center for Environmental Health*, Chief Judge Seeborg  
 13 noted that the Ninth Circuit has not specifically ruled on the permissibility of pre-judgment  
 14 vacatur in an Administrative Procedures Act case. That is correct. Yet Defendants fail to note  
 15 that: (a) the court in *Center for Environmental Health* asserted that the permissibility question  
 16 “need not be decided” there, rendering any statements about the issue pure *dicta*, *id.* at \*5; (b) the  
 17 court specifically highlighted the “arguably inconsistent positions across cases” taken by the  
 18 United States on this issue, *id.*; and (c) regardless, in *In re Clean Water Act Rulemaking*, No. 20-  
 19 04636-WHA, 2021 WL 4924844 at \*4 (N.D. Cal. Oct. 21, 2021), Judge Alsup canvassed cases  
 20 and specifically concluded that district courts have the equitable authority to couple an agency’s  
 21 pre-judgment vacatur request with a remand (*i.e.*, the precise relief Plaintiffs seek here). Neither  
 22 Defendants, nor Judge Alsup in *In re Clean Water Act*, nor Chief Judge Seeborg in *Center for*  
 23 *Environmental Health* have cited a single case within the Ninth Circuit squarely holding  
 24 otherwise.

25        Nevertheless, Defendants appear to suggest that this Court lacks authority to vacate the  
 26 Repeal at this stage of the proceedings. As noted above, Chief Judge Seeborg noted that federal  
 27 agencies have taken “arguably inconsistent positions across cases” on this issue. Accordingly,  
 28 Plaintiffs attach (as Exhibit A) a February 2022 brief filed by the U.S. Department of Justice—

1 referenced in *Center for Environmental Health*—in which the federal agency sought a pre-  
 2 judgment voluntary remand *with* vacatur, and argued that “[i]f a court grants a voluntary remand,  
 3 *it should then decide whether the agency’s action should be vacated during the remand.*”  
 4 Defendants’ Notice of Motion for Voluntary Remand and Memorandum in Support in *Native*  
 5 *American Land Conservancy v. Haaland*, No. 5:21-cv-00496-GW-AS (C.D. Cal. Dec. 3, 2021),  
 6 ECF No. 40, at 12. In that same brief, the Government argues—as Plaintiffs do here—that  
 7 “vacatur is appropriate” where there is a “serious question as to whether the [federal agency]  
 8 would reach the same decision.” *Id.* at 22. In this case, Defendants have conceded that they will  
 9 not reach the same decision. *See* Dkt. 63 (noting that the Department is “considering the issue  
 10 anew”).

11  
 12 Respectfully submitted,

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19 By: /s/ Daniel A. Zibel  
 20 DANIEL A. ZIBEL

21 Date: March 14, 2022

22 *Counsel for Plaintiffs*